IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 265 OF 2007

Saffaran Fashions ...Petitioner
V/s.
Mohd.Israil Saiyed ...Respondent

Mr.Ashish Kamath with Mr.Godfrey D'Silva for the Petitioner.
Mr.Rajesh Gehani for Respondent No.1.

CORAM : V.C. DAGA, J.

DATED : FEBRUARY 26, 2007

P.C. :-

1. Heard the learned Counsel for the petitioner.

Perused petition.

2. This petition is directed against the order dated 24th February, 2006 passed in Reference (IDA) No.529/2000 whereby the reference is partly allowed and the petitioner-employer is directed to pay back wages with continuity of service with effect from 1st December, 1998 till 20th August, 2003 to the respondent-workman.

3. The factual matrix revel that demand for reinstatement with full back wages with continuity of service with effect from 1st December, 1998 was made by the respondent vide his registered letter dated 5th

February, 1999; wherein he had specifically mentioned that he was appointed in the establishment with effect from January 1998 in the capacity of Tailor and his last drawn salary was Rs.3000/- per month. That his services came to be orally terminated without following due process of law with effect from 1st December, 1998. Consequently, the demand for reinstatement with full back wages and continuity of service was made.

4. The petitioner-employer did not respond to this letter. Therefore, the assertion made by the respondent-workman that he was appointed in the establishment with effect from 1st January, 1998, went unchallenge.

5. Respondent no.1 was required to approach the Deputy Commissioner of Labour, Mumbai since there was no compliance of his demand made in the notice of demand. The conciliation proceedings were opened. The respondent-workman has filed his Justification Statement repeating the same statements and contentions which were raised and made in the notice of demand, the details of which are given hereinabove. He has also emphasised and

asserted that he was in continuous employment right from January 1998 and worked continuously for more than 240 days.

6. On being noticed, the employer has appeared before the conciliation officer and filed his reply on 30th March, 1999 with one annexure showing date of appointment as 1st April, 1998, contending that the services of the workman were never terminated but the workman himself had abandoned his services. The conciliation officer submitted his failure report; which, ultimately, resulted in reference with the labour court.

7. In the reference proceedings, the statement of claim was filed by the respondent wherein he again reiterated all his contentions referred to hereinabove. The petitioner-employer filed its written statement denying the assertion made by the respondent-workman. It was sought to be reiterated by it that the respondent was appointed in the month of April, 1998 and that he did not complete 240 days service and therefore, reference was not tenable.

8. During the trial of the reference proceedings, respondent no.1 moved an application calling upon the petitioner-employer to produce salary slips, leave register, muster roll, overtime register, attendance card, appointment letter and bonus registers, cash register, vouchers, Factory/Shop and Establishment Licence, ESIC return, P.F.Return/challans maintained by the petitioner-employer. This prayer was opposed by the petitioner-employer. The arguments were heard. The said application seeking production of the documents was decided by the Labour Court vide order dated 20th August, 2003 (Exhibit-H reproduced on record of this petition), which contains observations reproduced hereinbelow.

> "On the other hand submission of the first party is that relevant period which is shown by the second party in the statement of claim, the employment of the second party is admitted by the first party."

. The Labour Court further observed as under :-

> "To my mind when the particular period of employment is admitted by the employer, the only question remains which is to be decided whether the termination was illegal or whether the second party abandoned the services suo-motto and for this purpose to my mind documents which are called by the second party may not be necessary and required."
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> (Emphasis supplied)

9. A perusal of the aforesaid observations and findings of the Labour Court, unequivocally, indicate that the parties were ad idem so far as period of employment stated in the statement of claim by the respondent-workman is concerned. This has, ultimately, resulted in denying prayer made in the application by which workman was seeking production of the documents. The Labour Court recorded finding on the basis of the submissions made by the parties that the period of employment not being in dispute, the production of documents was not necessary.

10. The observations made in the aforesaid order were neither challenged nor they are subject matter of challenge of this petition. Therefore, going by the record and what is recorded in the order by the court below, one has to accept the correctness of the observations made therein in view of the law laid down by the Supreme Court in the case of **Central Bank of India V/s. Vrajlal Kapurchand Gandhi and Another, reported in (2003) 6 SCC 573 and Bhavnagar University V/s. Palitana Sugar Mill (P) Ltd. and Others, reported in (2003) 2 SCC 111.**

11. At this juncture, it will not be out of place to mention if the employer had made a representation before the Labour Court accepting the period of employment shown in the statement of claim; and if such statement made by the employer is accepted and acted upon by the court including the opponent workman to his prejudice, then the employer is estopped or precluded from denying the correctness of the said statement and to say that no such statement was made. The petitioner cannot be allowed to blow hot and cold. The petitioner would be

bound by its statement and the representation made to the court and to the respondent-workman on which both of them acted upon.

12. The statement and the representation made by the petitioner having enured to its advantage cannot be allowed to be withdrawn to argue contrary to what was argued and accepted in the court below. Had no such statement been made by the petitioner-employer before the Labour Court, the court may have directed production of the records sought by the workman. Thus, the finding of the court below with regard to the period of employment would bind the petitioner as such it is not open to the petitioner to challenge the same in this writ petition. As a matter of fact, even without there being any order, it was obligatory on the part of the petitioner to produce the said record. The submissions advanced by the learned Counsel for the petitioner that it was no part of the petitioner's duty to produce documents needs outright rejection, in view of the observations of Their Lordships of the Privy Council in **Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6(A)**; which appositely apply here. This is

what Their Lordships observed :

> "A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Court the best material for its decision. With regard to their parties this may be right enough-they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This rule was again reiterated in **Rameshwar Singh v. Bajit Lal Pathak, AIR 1929 PC 95(B)**.

. The aforesaid legal position is accepted by the Apex Court in the case of **Hiralal and others v. Badkulal and others (AIR 1953 SC 225)** wherein Their

Lordships observed :-

> "Suit for recovery of amount due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so"

13. In the teeth of the above settle legal position, the petitioner cannot be heard of saying that the court did not grant prayer for production of documents which were in the custody of the employer as such it was no part of its obligation to produce and at the same time not to rely on the reason for refusal to grant such prayer. The documents asked for by the respondent were relevant for deciding the question whether respondent has completed 240 days period of employment. But in

view of the admission about period of employment which is recorded in the order, the Labour Court rightly thought that since the issue is not in dispute, it would not be necessary to direct production of these documents. In the absence of challenge to the findings and the observations made by the Labour Court in the order dated 20the August, 2003, it is not open for the petitioner to contend that the findings recorded by the Labour Court in the impugned order that the workman was engaged in the month of January as a Tailor and that he served continuously for 240 days in a English calender year, cannot be faulted. Having suffered with this order, the petitioner cannot take advantage of the order that the Labour Court itself rejected the application and therefore, it was not necessary on their part to produce these documents. Had the submission which is extracted hereinabove not been made by the Counsel appearing for the employer before the Labour Court, the Labour Court, probably, would have granted the prayer made by the petitioner. Under these circumstances, the submissions advanced by the petitioner cannot be accepted.

14. It is needless to mention that the learned Counsel for the petitioner tried to place reliance on the two judgments of the Apex court in **(2004) 8 SCC Pages 161 and 246 (Rajasthan State Ganganagar S. Mills Ltd. V/s. State of Rajasthan and Another, M.P. Electricity Board V/s. Hariram,** respectively) to contend that the burden to prove 240 days was on the workman. In this case, this submission is not very relevant; in view of the finding already suffered by the petitioner referred to hereinabove. Even otherwise; once both parties have led evidence then the question of onus is out of place and matter needs to be decided on the material available on record.

15. The learned Counsel for the petitioner tried to contend that the respondent-workman had abandoned his service. The said submission cannot be accepted in view of the fact that the burden was on the petitioner; which the petitioner has not discharged. In order to discharge the burden, it was obligatory on the part of the petitioner to establish that the respondent-workman was called upon to resume or report on duty by issuing letter or notice as held by Apex Court in the case of

AIR 2001 SC 227 (P.11). This burden has not been discharged by the petitioner-employer.

16. So far as other findings are concerned, essentially all those findings are based on appreciation of evidence and writ Court is not expected to reappreciate evidence once again in exercise of writ jurisdiction and substitute the findings recorded by the Labour Court. In the above view of the matter, no case is made out to interfere with the impugned order. Sufficiency of evidence cannot be gone into writ jurisdiction of this Court since this Court is not exercising appellate jurisdiction. This Court not being a Court of appeal, is not expected to reappreciate the evidence in view of the judgment of the Apex Court in the case of **Laxmikant Revchand Bhojwani & Anr. vs. Pratapsingh Mohansingh Pardeshi (1995) 6 SCC 576 (Para 9).**

17. In the result, the petition is dismissed in limine with no order as to costs.

. Certified copy expedited.

(V.C. DAGA, J.)